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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 284

LOUIS BERNARD LAPIDES, Petitioner

v.

TOM C. CLARK, Attorney General, and WATSON B. MILLER, Commissioner of the Immigration and Naturalization Service.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 8-12) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered May 23, 1949 (R. 13). The petition for a writ of certiorari was filed August 22, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Constitution forbids any classifications as between naturalized and native born citizens, particularly with regard to provisions for expatriation of naturalized citizens as the result of specified residence abroad subsequent to naturalization.

2. Whether Section 404 of the Nationality Act of 1940 establishes an unreasonable discrimination against naturalized citizens in subjecting them to loss of their citizenship as a consequence of their residence abroad subsequent to naturalization.

3. Whether the provisions of Section 404 have been applied arbitrarily and unreasonably against petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional provisions are relevant:

Article I, Section 8:

> The Congress shall have Power * * * To establish a uniform Rule of Naturalization * * *.

Article II, Section 1:

> No Person except a natural born Citizen * * * shall be eligible to the Office of President.[1]

Fifth Amendment:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *

A number of statutory provisions also require consideration. Most pertinent is Section 404 of the Nationality Act of 1940, 8 U.S.C. 804, which is directly challenged in this litigation and which provides:

> A person who has become a national by naturalization shall lose his nationality by:
>
> (a) Residing for at least two years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, if he acquires through such residence the nationality of such foreign state by operation of the law thereof; or

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[1] See also Art. I, Secs. 2 and 3, requiring that Representatives and Senators be citizens of the United States for seven and nine years, respectively.

(b) Residing continuously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 406 hereof;

(c) Residing continuously for five years in any other foreign state, except as provided in section 406 hereof.

Numerous exceptions to Section 404 are provided in Sections 405 and 406, 8 U.S.C. 805 and 806, which are quoted at pages 3-5 of the petition. Petitioner concededly did not qualify under any of these exceptions.

Under Section 409 of the Nationality Act of 1940, the expatriation provisions of Section 404 were scheduled to become effective on October 14, 1941, one year after the date of enactment of the Act. Because of war conditions, Congress authorized postponements of the effective date on four occasions: 55 Stat. 743, 56 Stat. 779, 58 Stat. 747, 59 Stat. 544. The last of these deferments expired six years after the date of approval of the Nationality Act, and consequently naturalized citizens who failed to return to the United States before October 14, 1946, became subject to expatriation under Section 404.

STATEMENT

Petitioner was born in Austria and entered the United States in 1922. He was naturalized as a citizen on June 27, 1928. Thereafter he continued

to reside in the United States for almost six years, and in March 1934 he went to Palestine where he remained until 1947. On July 3, 1947, petitioner arrived in the United States by airplane and sought to re-enter upon presentation of his uncancelled certificate of naturalization. However, on July 8, 1947, he was excluded by a board of special inquiry of the Immigration and Naturalization Service on the ground that he had lost his American citizenship under Section 404(c) of the Nationality Act of 1940 (*supra*, p. 4) by residing in Palestine for more than five years, and subsequent to October 14, 1946, and that he was an alien not in possession of a valid immigration visa. Petitioner's appeals to the Commissioner of the Immigration and Naturalization Service and to the Board of Immigration Appeals were unsuccessful, and on August 5, 1947, the order of exclusion was affirmed by the Board of Immigration Appeals, acting for the Attorney General. (R. 1-2.)

Petitioner thereupon brought habeas corpus proceedings in the District Court for the Southern District of New York in which he challenged the legality of his detention and exclusion and contended that he was entitled to enter as a citizen of the United States. The writ of habeas corpus was dismissed and the order of dismissal was affirmed by the Court of Appeals for the Second Circuit. (R. 4, 10; *United States ex rel. Lapides* v. *Watkins*, 165 F. 2d 1017 (C.A. 2.))

Petitioner then brought this action in the District Court for the District of Columbia seeking a judgment under Section 503 of the Nationality Act, 8 U.S.C. 903, declaring that he is a citizen of the United States. In this proceeding, petitioner attacked the constitutionality of Section 404. (R. 1-5.) A motion to dismiss the complaint was granted, and the Court of Appeals for the District of Columbia Circuit, one judge dissenting, affirmed, holding that Section 404 is constitutional (R. 9). The court also adverted to the prior habeas corpus proceeding and said that petitioner could have raised the constitutional issue there. The court doubted that there was justification "for this additional and needless litigation with all its trouble, expense and delay, which the law so much abhors," but "in view of the peculiar situation" did not pass on the question whether *res judicata* applied (R. 10).

ARGUMENT

1. Petitioner's contention (Pet. 9-14) that the Constitution utterly forbids any differentiation in treatment, even one admittedly reasonable, between naturalized and native born citizens rests, we believe, upon a misconception. As originally adopted, the Constitution had very little to say about the nature and incidents of American citizenship. Its prescriptions limiting eligibility for the Presidency to "natural born" citizens and authorizing Congress to establish a uniform rule of naturalization

obviously provide no definite guidance. Even the reference to "natural born" citizens is obscure and at this late date still provokes controversy. There was no attempt even to define in the Constitution the methods of acquiring citizenship until the Fourteenth Amendment in 1868 announced for the first time that all persons born or naturalized in the United States are citizens.

Even a cursory examination of the Constitution in its original and amended form reveals many patent omissions in its formulations regarding the rights and incidents of citizenship. For example, there was no attempt to fix the nationality status of children born abroad to American citizens. The status of such persons has always been regulated by statutes which were codified in Section 1993 of the Revised Statutes and later in Section 201 *et seq.* of the Nationality Act of 1940, 8 U.S.C. 601 *et seq.* Nor is there any provision in the Constitution regarding the loss of citizenship after it had been acquired by birth or naturalization. This phase of nationality status likewise has been dealt with by statutory pronouncements, principally the Act of March 2, 1907, 34 Stat. 1228, and Section 401 *et seq.* of the Nationality Act of 1940, 8 U.S.C. 801 *et seq.*

Thus, it seems evident that the limited expressions of the Constitution were not designed to provide a comprehensive formula describing the incidents of citizenship status. Consequently those meager expressions hardly can be relied on to ex-

clude any action by Congress in the area of expatriation into which the provisions of the Constitution did not venture. In that area the authority of Congress to act emerges by necessary implication as an attribute of sovereignty. *Mackenzie* v. *Hare,* 239 U. S. 299; *Reynolds* v. *Haskins,* 8 F. 2d 473 (C.A. 10). The sweep of that power is not hindered by any specific pronouncement of the Constitution. It is subject, we believe, only to the general barriers, such as the Fifth Amendment, which may limit the exercise of Congressional authority.

We do not understand that petitioner contests the authority of Congress to define expatriation, despite the silence of the Constitution in regard to such power. Indeed, such a contention hardly could be maintained, in our opinion, in the light of the needs of national sovereignty, the consistent legislative and executive attitudes, and the doctrines enunciated by this Court. *Mackenzie* v. *Hare, supra; Perkins* v. *Elg,* 307 U. S. 325. But petitioner seizes upon several general utterances in opinions of this Court to justify his thesis that under no circumstances can Congress deal with naturalized citizens in any manner other than it deals with the native born, even if such divergent treatment is justified by a reasonable objective. We certainly do not question the general statements quoted in petitioner's brief, when read in their contexts. As a general proposition it is indisputable that a naturalized citizen stands on an equal footing with

the native born. We do not urge that there is any warrant for minimizing the full citizenship status which an alien acquires upon his naturalization. But like other groups of Americans, naturalized citizens may be required to conform with a regulation fostered by a national need and incorporated in a reasonable enactment. We submit that no determination or even observation by this Court negates such a principle. Cf. *Knauer* v. *United States,* 328 U.S. 654, 658, where the Court referred to Section 404 of the Nationality Act as creating an "exception of a limited character" to the rights and prerogatives acquired by naturalization.[2]

This concept is not inconsistent with *Osborn* v. *United States Bank,* 9 Wheat. 738, 827 (see Pet. 9). The comments of Chief Justice Marshall were entirely *dicta* and did not consider any specific question of citizenship or expatriation. Moreover, they were uttered at a time of great confusion and uncertainty as to whether an American citizen had a right to expatriate himself. See *Talbot* v. *Jansen,* 3 Dall. 133; *The Santissima Trinidad,* 7 Wheat. 283. The courts still were influenced by the common law doctrine of perpetual allegiance, which declared that no man could change the allegiance of his birth. Blackstone, *Commentaries* (Dean Gavit's Ed.) Book 1, Ch. 10, p. 156. Eventually,

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[2] Another limitation in the status of a naturalized citizen is the possibility that his naturalization may be revoked if it was fraudulently or illegally procured. *Knauer* v. *United States, supra; Klapprott* v. *United States,* 335 U.S. 601.

that uncertainty was eliminated, and the right of expatriation has been accorded positive recognition since the Act of July 27, 1868, 15 Stat. 223, later R.S. § 1999, 8 U.S.C. 800.

The executive declarations cited in petitioner's brief, pp. 11-13, favoring unlimited protection of American citizens residing abroad likewise represent a national policy which has been modified somewhat as the result of many years of experience. Later legislative and executive expressions have formulated conditions under which certain categories of American citizens who choose to live outside the United States may forfeit their claim to diplomatic protection and may abandon their American citizenship.

The implication of petitioner's argument that Section 404 represents a new departure in national policy hardly conforms with the facts. He has overlooked, for example, the many treaties concluded by the United States with foreign nations providing for loss of citizenship by an American national who reestablishes residence in his country of origin. *Perkins* v. *Elg,* 307 U.S. 325; Van Dyne, *Naturalization,* p. 335. He overlooks, also, the later executive policy, formulated prior to legislative action, which denied diplomatic protection to naturalized citizens who abandoned their domicile in the United States. See 3 Hackworth, *Digest of International Law,* 286-288. He disregards two specific enactments directed at naturalized cit-

izens who established homes in foreign countries. The first of these was Section 15 of the Act of June 29, 1906, 34 Stat. 601, later reenacted in substantially the same form as Section 338(c) of the Nationality Act of 1940, 8 U.S.C. 738(c), which directed that the naturalization of a person who established permanent residence in a foreign country within five years after his naturalization should be deemed presumptively fraudulent and subject to revocation. *Luria* v. *United States*, 231 U.S. 9, sustained the constitutionality of this enactment. The second Congressional directive was Section 2 of the Act of March 2, 1907, 34 Stat. 1228, which stipulated that

> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen * * *.

The validity of this prescription was recognized, at least tacitly, in *United States* v. *Gay*, 264 U.S. 353.

These declarations are evidence of a generally accepted conviction that

> The tie which binds the naturalized citizen to his adopted country has always been recognized as more easily dissoluble than that which binds the native citizen of his country. [Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p. 701.]

But it must not be supposed that such restrictions have been directed only against naturalized citizens. Certain categories of persons who acquired United States citizenship at birth likewise have been deemed subject to similar limitations.[3] Thus a native born American who acquired dual nationality when taken by his parents to another country during minority may lose his American citizenship unless he returns to the United States within a reasonable time, now fixed at two years, after attaining his majority. *Perkins* v. *Elg,* 307 U.S. 325; *Attorney General* v. *Ricketts,* 165 F. 2d 193 (C.A. 9); Section 401(a), Nationality Act of 1940, 8 U.S.C. 801(a). A person who acquires United States citizenship at birth abroad also may, under certain conditions, be subject to loss of that citizenship unless he establishes residence in the United States before certain designated times. Section 201 (g-i), Nationality Act of 1940, and as added by Act of July 31, 1946, 60 Stat. 721, 8 U.S.C. 601(g-i); Section 1, Act of May 24, 1934, 48 Stat. 797.[4]

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[3] At one time the Department of State took the view that native born citizens might lose their United States citizenship and the right to diplomatic protection upon establishment of permanent residence outside the United States. 2 Hyde, *International Law* (2d Rev. Ed., 1945) 1170. However, that view no longer is followed. *Id.* 1171. It should be observed that many other nations regard a citizen's residence in another country as an act of expatriation. Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p. 701.

[4] It has been estimated that 85% of all expatriations involve persons who acquired United States citizenship at birth

Moreover, petitioner's denial that any distinctions are permissible in dealing with different classifications of United States citizens is refuted by several decisions of this Court. Thus, *Mackenzie* v. *Hare*, 239 U.S. 299, upheld expatriation provisions directed only against Americans of the female sex. And *Hirabayashi* v. *United States*, 320 U.S. 81, and *Korematsu* v. *United States*, 323 U.S. 214, sustained extraordinary restrictions imposed as war measures solely against American citizens of Japanese extraction.

The assumption that the Constitution forbids reasonable classifications or distinctions in the treatment of different groups of citizens thus seems unsupportable. And even the general doctrine proscribing unreasonable legislative classifications has only a limited application in this case. The Fifth Amendment contains no equal protection clause and as a consequence Congressional enactments generally are not subject to attack on the ground of unfair classification. *Detroit Bank* v. *United States*, 317 U.S. 329, 337; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584. For this reason most of the decisions which have condemned unequal classifications have concerned state legislation. E. g., *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Truax* v. *Raich*, 239 U.S. 33. But we do not contend that there are

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and only 15% involve naturalized citizens who lose citizenship for any cause, including residence abroad. Krichefsky, *Loss of United States Nationality*, 4 Imm. & Nat. Monthly Rev. 9 (1946).

no limits to the authority to define conduct which may cause loss of citizenship. It seems clear that arbitrary federal deprivations of a citizen's rights would be subject to attack under the Fifth Amendment as a denial of due process. *Hirabayashi* v. *United States,* 320 U.S. 81, 100.

2. A manifest attribute of the legislative process is that it frequently requires varying treatment of different groups in order to accomplish substantial public purposes. *Truax* v. *Corrigan,* 257 U.S. 312, 337. Classification is not in itself an undesirable device and only unreasonable classifications are denounced by the courts. *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410; *Clarke* v. *Dekebach,* 274 U.S. 392. On many occasions this Court has upheld differentiations in treatment affecting various groups of citizens and residents, upon a showing that the classification was reasonably devised to meet a demonstrated need.[5]

We submit, contrary to petitioner's contention (Pet. 14-18), that the provisions of Section 404 of the Nationality Act are entirely fair and reasonable and are based upon solid considerations of national interest. They represent the culmination of a pol-

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[5] *Terrace* v. *Thompson,* 263 U. S. 197; *Heim* v. *McCall,* 239 U. S. 175; *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Porterfield* v. *Webb,* 263 U. S. 225; *Cockrill* v. *California,* 268 U. S. 258; *Clarke* v. *Dekebach, supra; Mackenzie* v. *Hare, supra; Hirabayashi* v. *United States, supra; Korematsu* v. *United States, supra;* cf. *Takahashi* v. *Fish and Game Commission, supra; Oyama* v. *California,* 332 U. S. 633.

icy considered and developed over a period of many years.

The United States consistently has been confronted with embarrassments and difficulties provoked by certain groups of its citizens who chose to live in foreign lands. One of such groups included native born Americans who had acquired foreign nationality during their minority. See *Perkins* v. *Elg, supra.* Another such group comprised naturalized citizens who left the United States and established residence in the land of their former nationality or in other foreign lands. The national experience in dealing with these and similar situations has demonstrated an urgent need for remedial legislation.

The latter category of citizens has engendered many difficulties in the diplomatic relations of the United States with other countries. Although the vast majority of naturalized citizens have come to settle permanently and become completely assimilated in our national life, a small minority has utilized American citizenship only as a protective cloak. Some individuals have resided in the United States for the short prescribed period, acquired naturalization, and then have sought the protection of the United States in other lands. They have attempted to use American citizenship to evade obligations to which they were subject in the countries of their residence. The ties that bound these persons to the United States were tenuous.

In many instances they falsely represented that they intended to reside permanently in the United States. See Section 332(a)(18), Nationality Act of 1940, 8 U.S.C. 732(a)(18). They were merely formal citizens, whose contributions to our national life were negligible, and whose continued claim to American citizenship was a source of continued friction with other nations. 3 Moore, *International Law Digest*, 766.

The executive and legislative branches of our Government have sought for many years to cope with this problem. As we have indicated, the Department of State long ago held, even prior to the enactment of any legislation, that a citizen who established himself in a foreign country and continued to reside there without any satisfactory reason for failing to return to the United States thereby lost any right to diplomatic protection. 3 Moore, *op. cit., supra;* 3 Hackworth, *Digest of International Law*, 288. The first statute to deal with this problem was Section 15 of the Act of June 29, 1906, 34 Stat. 601, which authorized revocation of the naturalization of any person who became a permanent resident of a foreign country within five years after his naturalization. In approving that enactment in *Luria* v. *United States*, 231 U.S. 9, 23, this Court declared:

> These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as name—that he should

> assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the Government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past.
>
> By the clearest implication those laws show that it was not intended that naturalization could be secured thereunder by an alien whose purpose was to escape the duties of his native allegiance without taking upon himself those of citizenship here, or by one whose purpose was to reside permanently in a foreign country and to use his naturalization as a shield against the imposition of duties there, while by his absence he was avoiding his duties here.

Within a year Congress again studied this problem and concluded that additional legislation was required. That conclusion was reflected in Section 2 of the Act of March 2, 1907, 34 Stat. 1228, quoted at p. 11, *supra*. In its report recommending this legislation the Committee on Foreign Affairs of the House of Representatives made the following comments (H. Rep. 6431, 59th Cong., 2d sess., p. 2):

> Perhaps the most important provision of the bill is desired by the State Department to guard against complications in which this country has often been involved. All desire

that the flag of this country should protect an American citizen to the fullest extent. But none of us desire that some foreigner who does not intend to cast his lot permanently with us should endeavor to avail himself of the flag as a fraudulent protection. Many foreigners come here, become naturalized, and then return to their own countries or migrate to other parts of the world, without any intention of returning to this country. They have not become citizens in good faith, but they seek to avail themselves of the protection of our citizenship in avoiding responsibility to which they may be subjected in other parts of the world.

This is not right. The citizenship of the United States should not be sought or possessed for commercial or dishonest ends. To guard against this evil this bill provides that a naturalized citizen who leaves this country and dwells elsewhere continuously for five years shall be presumed to have abandoned his citizenship. This presumption can be overcome, but such a provision as this would be a great assistance to the Department of State, would avoid possibilities of international complications, and will prevent those who are not entitled to its protection from dishonestly hiding under the American flag.

See also 3 Hackworth, *Digest of International Law*, 287.

The 1907 Act proved inadequate. In the first place, the prevailing view was that the statute did

not cause loss of citizenship but forfeited only the right to diplomatic protection.[6] Moreover, the Department of State experienced considerable difficulty in evaluating evidence as to whether persons affected by the statute had overcome the presumption it created. 3 Hackworth, *Digest of International Law*, 294 et seq. Consequently, the nationality status of such persons remained uncertain and many persisted in claiming American citizenship despite inconsistent conduct over the course of many years.

Quite understandably, therefore, serious consideration was given to this problem when the Nationality Act of 1940 was being formulated. That statute was proposed in the first instance by a committee consisting of the Secretary of State, the Attorney General, and the Secretary of Labor. *Hearings before Committee on Immigration and Naturalization on H.R. 6127, Superseded by H.R. 9980*, 76th Cong., 1st sess., p. 691 (1940). After a five-year study, the Cabinet Committee submitted a draft code to the President, who transmitted it to Congress on June 13, 1938. *Id.*, 511, 512. In their letter of transmittal, the Cabinet Committee made the following observations (*Id.*, 407, 409):

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[6] *Camardo* v. *Tillinghast*, 29 F. 2d 527 (C.A. 1); *United States* v. *Eliasen*, 11 F. 2d 785 (W.D. Wash.); *Stein* v. *Fleischmann Co.*, 237 Fed. 679 (S.D. N.Y.); 28 Op. Atty. Gen. 504. *Contra: Nurge* v. *Miller*, 286 Fed. 982 (E.D. N.Y.); *Anderson* v. *Howe*, 231 Fed. 546 (S.D. N.Y.). See also *United States* v. *Gay*, 264 U.S. 353.

The nationality problem in the United States is especially complex and difficult for several reasons. In past years large numbers of persons of foreign origin have come to the United States, have had children born to them in this country, and have subsequently returned to reside in the foreign countries from which they came, or have moved on to other foreign countries, taking their American-born children with them. In some cases the parents while in the United States obtained naturalization as citizens thereof, and in such cases children born to them in foreign countries after such naturalization have acquired citizenship of the United States at birth, under the provision of the existing law (R.S. 1993). Children born in the United States to persons of the classes mentioned acquired at birth citizenship of the United States, and in many cases they also acquired at birth the nationality of the foreign states from which their parents came, thus becoming vested with dual nationality. Dual nationality has also attached at birth to children born in certain foreign countries, having in their law of nationality the territorial rule (*jus soli*), to parents who acquired American nationality at birth or through naturalization.

* * * * *

Important reasons for terminating American nationality in cases of persons who reside in foreign countries and have to all intents and purposes abandoned the United States lie in the fact that it will prevent them from trans-

mitting American nationality to their foreign-born children having little or no connection with the United States, and embroiling this Government in controversies which they may have with the governments of the foreign countries in which they reside. The mere presumption of expatriation provided for in section 2 of the act of March 2, 1907, in cases of naturalized citizens residing for 2 years in the foreign states from which they came or 5 years in other foreign states, has proven inadequate. In general the right to protection should be coexistent with citizenship, and a law under which persons residing abroad are denied the protection of this Government, although they remain citizens of the United States and transmit citizenship to children born abroad, is deemed inconsistent and unreasonable. The admission of an alien to the privilege of American citizenship is subject to the condition that he intends to reside permanently in the United States and perform the duties of citizenship. When a naturalized citizen abandons his residence in the United States and takes up residence in the state of which he was formerly a national, definite termination of his American citizenship should follow.

The Cabinet Committee recommended enactment of provisions similar to those now found in Sections 404(a) and (b) relating to return by naturalized citizens to the country of their former allegiance. However, evidence developed in the Congressional hearings indicated the need for expansion of these

provisions to encompass residence by naturalized citizens in other foreign countries. *Id.*, 134-135, 139-141, 317. Consequently, the House Committee recommended enlargement of the proposed section to embrace what is now Section 404(c). H. Rep. 2396, 76th Cong., 3d sess., p. 84. The importance of this provision was emphasized by its sponsor in presenting it to the House. 86 Cong. Rec. 11948, 11949. After passage by the House, the bill was considered by the Senate Committee on Immigration, which reported it favorably and said of Section 404 (S. Rep. 2150, 76th Cong., 3d sess., p. 4):

> These provisions for loss of nationality by residence abroad would greatly lessen the task of the United States in protecting through the Department of State nominal citizens of this country who are abroad but whose real interests, as shown by the conditions of their foreign stay, are not in this country.

It is clear, therefore, that subsection (c) was not "one of those last minute amendments," as petitioner asserts (Pet. 17). It was the product of a long process of legislative experience and deliberation. It sought to achieve the following legitimate objectives: (a) to eliminate the uncertainties in citizenship status produced by the Act of March 2, 1907; (b) to discourage the wrongful acquisition of American citizenship by persons who do not intend to reside permanently in the United States, despite their representations in the naturalization

proceedings; (c) to prevent the retention of American citizenship by naturalized persons who utilize such citizenship only for the purpose of shielding them from obligations incident to their residence in other countries, without any reciprocal contribution on their part to the national welfare of the United States; (d) to preclude the transmission of American citizenship by such persons to their children born abroad; and (e) to avoid international embarrassments resulting from the activities of such individuals. These aims, we believe, are demonstrably sound and reasonable. Like the many other grounds for expatriation enumerated in Title IV of the Nationality Act, the proscriptions of Section 404 were aimed at conduct deemed inconsistent with fidelity to the United States.

We believe, therefore, that there is no basis for petitioner's complaint that Section 404(c) unjustly discriminates against naturalized citizens or relegates them to the status of second class citizens. That statute, as we read it in the light of its history and purpose, seeks to achieve no discrimination and no irrational impairment of citizenship status, but proclaims rather the conditions under which certain naturalized citizens may lose their citizenship by conduct that conflicts with the obligations of citizenship they have assumed. This, in our opinion, is a reasonable classification to fulfill a solid legislative purpose. And the legislation as a whole inherently furnishes convincing evidence of

the Congressional desire to deal fairly with all persons who might be affected, by specifically excluding from its ambit numerous groups who have a substantial motive for continuing to remain outside the United States, such as illness, advanced age, employment by the Government of the United States or by American business concerns, etc. Sections 405 and 406, Nationality Act of 1940, 8 U.S.C. 805 and 806.

Petitioner suggests, however, that even if there is warrant for such action by Congress in the case of persons who return to their native country, there is no evidence of a need for legislation directed against naturalized citizens who reside in countries other than those of their former nationality. This suggestion does not square with the factual situation found by Congress, which concluded that although the problem might be more acute where residence was established in the naturalized person's native country, there was adequate evidence of abuse in other cases. In any event, we believe that the evaluation of this evidence was for Congress.

It is well settled that a statute which fulfills sound legislative objectives may not be assailed because it fails to denounce other similar misconduct. Congress can legislate for one evil at a time and may decline to penalize other conduct it does not deem equally reprehensible. *United States* v. *Petrillo*, 332 U.S. 1; *Hirabayashi* v. *United States*,

320 U.S. 81, 100; *Patsone* v. *Pennsylvania,* 232 U.S. 138, 144. On the basis of evidence it deemed satisfactory, Congress restricted the requirements of Section 404 to naturalized citizens. Unquestionably it concluded that there was insufficient evidence of abuse by native born citizens. Possibly it may decide to diminish or mitigate the restrictions now found in that section. Those determinations, we submit, are confided exclusively to the discretion of Congress.

3. Petitioner's attempts to show that Section 404 has been applied unreasonably against him appear to be quite unsubstantial. In the first place, he argues that the statute arbitrarily deprived him of his citizenship without his consent (Pet. 19, 21). Concededly, Section 404, like similar provisions of the Nationality Act, is aimed only at a voluntary loss of citizenship. *Perkins* v. *Elg,* 307 U.S. 325; *Dos Reis* v. *Nicolls,* 161 F. 2d 860 (C.A. 1). But the voluntarily relinquishment which is the essence of expatriation follows from "a condition voluntarily entered into, with notice of the consequences." *Mackenzie* v. *Hare,* 239 U.S. 299, 312. Petitioner's voluntary residence in a foreign country for the prescribed period, without extenuation, subjects him to the disability prescribed by the statute.

Petitioner contends further (Pet. 21) that because of war conditions it is unfair to visit against him the consequence which flows from the appli-

cation of the conditions prescribed in Section 404. That, too, might be a significant factor in the disposition of this case if it were substantiated by any evidence of hardship. But he did not allege (see R. 1-5) that his failure to return to the United States within the required time was occasioned by transportation difficulties or any other conditions attributable to the war. He left the United States in 1934 and remained away for many years before the war. Indeed, he pleaded no excuse for his failure to return seasonably, before, during or after the war.

It should be pointed out in this connection that in the administration of this statute the Attorney General has granted wide latitude to American nationals whose return to the United States was delayed by war conditions. It is the administrative view that a naturalized citizen who attempted in good faith to return to the United States within the stipulated period but whose timely return was delayed by conditions beyond his control did not lose his American citizenship under Section 404. *In re V—*, A-6501663, BIA February 28, 1947, approved by Atty. Gen. May 14, 1947, 2 I. & N. Dec.—; *In re C—*, C-192976 (A-6576113), Comm., June 6, 1947, 2 I. & N. Dec.—; see also *Orlando* v. *Marshall,* E.D. Pa., Civ. No. 8766, decided July 14, 1949. Thus, petitioner cannot substantiate either the general asseveration that the statute has been arbitrarily applied, even in other cases, or the

specific statement on page 7 of the petition that several thousand American citizens who were stranded abroad during the war would be affected by the decision in this case.

Finally, there is no merit in petitioner's contention that Section 404(c) has been applied retrospectively against him. Petitioner resided abroad for 13 years. During that time he became subject to the presumption established by Section 2 of the Act of March 2, 1907 (*supra,* p. 11), and conceivably may have lost his citizenship under the terms of that statute. But the application of Section 404(c) in the instant case has been entirely prospective and has not taken into account any conduct prior to the enactment of the Nationality Act. Congress granted four postponements of the effective date of Section 404, six years altogether, in order to provide for persons whose return was prevented by war conditions. Section 409, Nationality Act of 1940, as amended, 8 U.S.C. 809. After the effective date of the Nationality Act as a whole, petitioner continued to reside abroad for more than the five-year period specified in Section 404(c), and such residence continued beyond the terminal date finally fixed for return to the United States. Therefore he was governed entirely by the conditions previously fixed by that section and must be deemed to have expatriated himself, even though his citizenship was acquired earlier. *Mackenzie* v. *Hare, supra; Johannessen* v. *United States,* 225 U.S. 227.

CONCLUSION

The Courts of Appeals in two circuits have ruled against this petitioner's claim to United States citizenship. There is no conflict. We believe petitioner has presented no substantial basis for questioning the decision below. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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